

No. 12864

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

C B S STEEL AND FORGE, a corporation,

Appellant,

vs.

GORDON W. SHULTZ, ERNEST PUETZ, LEE MCCOY, HOWARD LANE, and HAROLD W. GENTIS,

Appellees.

On Appeal From the United States District Court for the
Southern District of California Central Division

BRIEF FOR APPELLANT.

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TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	2
Specification of errors relied on.....	3
Argument	4
I.	
Third parties defendant are liable to third party plaintiff in the amount of any judgment recovered by plaintiffs against third party plaintiff.....	4
II.	
The liability of third parties defendant to third party plaintiff may be asserted by way of third party complaint.....	5
III.	
The third party complaint is ancillary to the main action, and there is no necessity for an independent ground of federal jurisdiction as between third party plaintiff and third parties defendant	5
Conclusion	6

TABLE OF AUTHORITIES CITED

CASES	PAGE
Barkeij v. Don Lee, 34 Fed. Supp. 458.....	6
Crum v. Appalachian Power Co., 29 Fed. Supp. 90.....	6
Greenleaf v. Huntington R. R., 3 F. R. D. 24.....	5
Schram v. Roney, 30 Fed. Supp. 458.....	6
Williams v. Keyes, 125 F. 2d 208.....	6
 STATUTES AND RULES	
California Labor Code, Sec. 2865.....	4
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1337.....	1
United States Code, Title 29, Sec. 216(b).....	1
Federal Rules of Civil Procedure, Rule 14.....	4
Federal Rules of Civil Procedure, Form 22.....	6
 TEXTBOOKS	
Restatement of Law of Agency, Sec. 379.....	4
Restatement of Law of Agency, Sec. 399	4, 5

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Jurisdiction.

This is an employee wage suit instituted by complaint [R. 3-7] under Sec. 16(b) of the Fair Labor Standards Act of 1938, as amended (Title 29 U. S. C., Sec. 216(b)). The District Court had jurisdiction by virtue of Title 28 U. S. C., Sec. 1337, relating to civil actions brought under any Act of Congress regulating commerce. Appellant, CBS Steel and Forge, which was a defendant below, answered [R. 8-13] and pursuant to leave granted filed a third party complaint [R. 19-21], which was ancillary to the main action (Rule 14, Federal Rules of Civil Procedure). The District Court held that the third party complaint failed to state a claim upon which relief could be granted and gave judgment dismissing the same on the merits [R. 31-32]. This appeal is from that judgment.

This Court has jurisdiction of the appeal by virtue of Title 28 U. S. C., Sec. 1291, which confers jurisdiction to review final decisions of the district courts. (The pertinent portions of the statutes and rule cited are set forth in the Appendix.)

Statement of the Case.

This action was brought by Howard Lane and Harold W. Gentis, plaintiffs, against CBS Steel and Forge, a corporation (designated in the complaint as C.B.S. Steel and Forge Company), and fictitiously named defendants to recover money allegedly due as overtime compensation, liquidated damages, and attorney fees under the Fair Labor Standards Act of 1938, as amended [R. 3-7].

Defendant CBS Steel and Forge answered, denying liability [R. 8-13].

Thereafter, defendant CBS Steel and Forge moved for leave to bring in Gordon W. Shultz, Ernest Puetz, and Lee McCoy as third parties defendant and serve on them a third party complaint in the form attached to the notice of motion [R. 13-17].

There being no opposition to said motion, the District Court granted the same and gave defendant CBS Steel and Forge leave to serve a third party complaint in the form proposed [R. 18], which was done [R. 19-25].

The third party complaint alleged in substance: (1) that Lane and Gentis had brought an action against CBS Steel and Forge to recover overtime compensation, liquidated damages, and attorney fees accruing to them during their employment by the corporation from April 1 to November 1, 1948; (2) that CBS Steel and Forge had denied liability; (3) that during the period in question Shultz was president, Puetz comptroller, and McCoy forge shop

superintendent of the corporation, and it was their duty to cause the corporation to keep complete and accurate records of overtime worked and to pay employees promptly when due any overtime compensation owing them; and (4) that if CBS Steel and Forge was liable to Lane or Gentis in any amount it was because of the negligence or other misconduct of Shultz, Puetz, and McCoy. The third party complaint prayed judgment against the third parties defendant for all sums that might be adjudged against CBS Steel and Forge in favor of Lane and Gentis [R. 19-21].

The third parties defendant moved for summary judgment and alternatively for dismissal of the third party complaint for failure to state a claim upon which relief could be granted [R. 26-29].

No action was taken on the motions for summary judgment. The District Court held that the third party complaint failed to state a claim upon which relief could be granted [R. 30]. Judgment of dismissal followed [R. 31-32]. Subsequently, the District Court denied the motion of third party plaintiff to vacate the judgment of dismissal [R. 36].

The question involved in this appeal is whether the third party complaint states a claim upon which relief can be granted.

Specification of Errors Relied on.

1. The trial court erred in dismissing the third party complaint.
2. The trial court erred in giving judgment of dismissal of the third party complaint.
3. The trial court erred in denying the motion of defendant and third party plaintiff to vacate said judgment of dismissal.

ARGUMENT.

I.

Third Parties Defendant Are Liable to Third Party Plaintiff in the Amount of Any Judgment Recovered by Plaintiffs Against Third Party Plaintiff.

The third party complaint alleges that third parties defendant were the responsible officers of the corporation during the period in question and that it was their duty to cause the corporation to keep complete and accurate records of overtime worked and to pay employees promptly when due any overtime compensation owing them. It is further alleged that if the corporation is liable to plaintiffs in any amount it is because of the negligence or other misconduct of third parties defendant.

As agents of the corporation of course third parties defendant owed their principal the duty of acting with care and skill.

Sec. 2865, Labor Code of California (Appendix); Restatement, Agency, Sec. 379(1).

Negligence on the part of an agent which causes his principal to become subject to liability gives rise to an action by the principal against the agent.

Restatement, Agency, Sec. 379(1), Comment (b), Sec. 399.

Thus it is clear that Shultz, Puetz, and McCoy are liable to CBS Steel and Forge for any negligence which subjected CBS Steel and Forge to liability to Lane and Gentis under the Fair Labor Standards Act.

II.

The Liability of Third Parties Defendant to Third Party Plaintiff May Be Asserted by Way of Third Party Complaint.

An agent whose negligence subjects his principal to liability may be impleaded as a third party defendant in an action brought against the principal by another. The case falls squarely within the provisions of Rule 14, Federal Rules of Civil Procedure. (Appendix.)

For example, in an action against a railroad for negligent injury the defendant properly brought in its engineer as third party defendant.

Greenleaf v. Huntington R. R., 3 F. R. D. 24.

“A principal whose agent has violated . . . his duties has an appropriate remedy for such violation. Such remedy may be: . . . (h) Causing the agent to be made party to an action brought by a third person against the principal.”

Restatement, Agency, Sec. 399.

III.

The Third Party Complaint Is Ancillary to the Main Action, and There Is No Necessity for an Independent Ground of Federal Jurisdiction as Between Third Party Plaintiff and Third Parties Defendant.

It was argued to the District Court, and the third parties defendant will probably continue to assert upon the appeal, that jurisdiction was lacking in the District Court to entertain the third party complaint for want of diversity or other independent Federal jurisdictional ground as between third party plaintiff and third parties defendant. The con-

tention is without merit. The third party complaint is merely ancillary to the main action and no independent ground of Federal jurisdiction is necessary to sustain the third party complaint.

Williams v. Keyes, 125 F. 2d 208;

Crum v. Appalachian Power Co., 29 Fed. Supp. 90;

Barkeij v. Don Lee, 34 Fed. Supp. 874;

Schram v. Roney, 30 Fed. Supp. 458.

See also,

Official Form 22, Federal Rules of Civil Procedure.

Conclusion.

It is submitted that the third party complaint states a claim upon which relief can be granted, that the District Court erred in granting the motions to dismiss the third party complaint, and that the judgment of dismissal is erroneous and should be reversed.

Respectfully submitted,

RICHARD A. PERKINS,

Appellant's Attorney.

APPENDIX.

U. S. Code, Title 29, Sec. 216(b):

Any employer who violates the provisions of Sec. 6 or Sec. 7 of this Act shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated . . . the court in such action shall in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

U. S. Code, Title 28, Sec. 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce . . .

Rule 14, Federal Rules of Civil Procedure:

(a) Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 . . .

U. S. Code, Title 28, Sec. 1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . except where a direct review may be had in the Supreme Court.

California Labor Code, Sec. 2865:

An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer . . .